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WONG KIEN YIP & ANOR v. BYARD SPIRAL MILL SDN BHD & ANOTHER APPEAL

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COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
VAZEER ALAM MYDIN MEERA JCA
DARRYL GOON SIEW CHYE JCA
[CIVIL APPEAL NOS: B-02(IM)(NCC)-715-06-2020
& B-02 (IM) (NCC)-716-06-2020]
2 MARCH 2022

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Abstract – *Leave under s. 471 of the Companies Act 2016 is required if a member of the company, in claiming declaratory relief against the directors and the company (in liquidation), wishes to attach liability on the company or its assets. Depending on the reliefs sought, such as the purchase of shares registered, the company may be appropriately included as a party to the proceedings,* albeit *as a nominal party.*

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CIVIL PROCEDURE: *Striking out – Originating summons – Originating summons against directors/shareholders of company – Company wound up – Originating summons proceeded against company – Shareholders/directors applied to strike out originating summons on ground that company wound up and no leave to proceed against company granted – Whether originating summons ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

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COMPANY LAW: *Winding up – Company – Originating summons against directors/shareholders of company – Company wound up – Originating summons proceeded against company – Whether leave required – Whether liability intended to be fastened on company or its assets – Whether company sued merely as nominal defendant – Companies Act 2016, ss. 346(1)(a), (b) & 471*

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There were two appeals which arose from the originating summons ('OS') filed at the High Court by the appellants ('plaintiffs') against the respondents ('defendants'). The OS was filed by the plaintiffs, invoking s. 346 of the Companies Act 2016 ('CA 2016') on the grounds that: (i) the plaintiffs did not take any active role in managing the company and left it to the first defendant who was the managing director and had full control of the company; (ii) sometime in December 2017, the plaintiffs discovered that the first defendant had been misusing funds of the company for his own personal interest, thereby dissipating the assets of the company; (iii) all efforts and attempts to resolve the matter failed; (iv) the affairs of the company were conducted or the powers of the directors were being exercised by the first and second defendants oppressively and/or in disregard of the plaintiffs' interests as members and/or shareholders; (v) the various acts of the first and second defendants had been done or were threatened to be done in a manner which

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would unfairly discriminate against and/or was prejudicial to the plaintiffs. Two days after the OS was filed, the company was wound up and the plaintiffs sought leave of the winding up court pursuant to s. 471(1) of the CA 2016 to proceed with the OS against the company. The winding up court held that no leave was required since no liability was intended to be fastened on the company or its assets as the company was sued merely as a nominal defendant. Following this decision, the defendants applied to strike out the OS on the ground that the company had been wound up and no leave to proceed against the company was granted. The High Court Judge ('HCJ') accepted the applicability of the decision in *Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Or*s ('*Henrick*') and concluded that (i) the attempts to distinguish *Henrick* from the case at hand was without any valid basis and must be rejected; (ii) the reliefs sought in the OS for a 'buy out' of shares '… could not be granted as it was contrary to the statutory prohibition in s. 346 of the CA 2016 against share transfers after the winding up of the company'; and (iii) the OS was no longer maintainable by reason of the company being wound up and it was no longer necessary to deal with the issue of whether leave was required to proceed with the OS. Hence, the present appeals.

Held (allowing appeals)
Per Darryl Goon Siew Chye JCA delivering the judgment of the court:

(1) The decision in *Henrick* echoed the reasoning applied in *Webb v. Stanfield*. This could be seen from the statement made by the majority in *Henrick* that 'It should therefore be opened to the aggrieved party to bring his complaint to the liquidator without having to resort to s. 181 of the Companies Act 1965 ('CA 1965')'. As the provisions in s. 181(1)(a) and (b) of the CA 1965 were materially the same as those in the current s. 346(1)(a) and (b) of the CA 2016, there was no reason why a claim for damages under the latter could be said to be obviously unsustainable. Liability may devolve upon the defendants personally, as directors at the material time. The issue would be dependent on whether, upon the facts, the plaintiffs were able to prove their case and could demonstrate that they had suffered any actual loss or damage that ought rightly be compensated by the defendants. (paras 32, 38 & 39)

(2) If liability was intended to be imposed on the company or any of its assets in the OS, leave under s. 471 of the CA 2016 would be required. In the instant case, however, the company was merely a nominal party. In light of the reliefs sought, particularly the purchase of the shares registered in the name of the first plaintiff by the defendants, the company was appropriately included as a party to the proceedings, *albeit* as a nominal party. The OS ought not to have been struck out summarily. The OS could not be said to be obviously unsustainable. The decision of the High Court was set aside. The OS was remitted to the High Court to be heard. (para 54)

Case(s) referred to:

Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors [2021] 4 CLJ 721 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals [2002] 2 CLJ 1 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2011] 1 CLJ 1 FC ***(refd)***

Drico Ltd v. Drico (Water-Specialist) Sdn Bhd & Ors [2013] 1 LNS 1297 CA ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors [2003] 2 CLJ 445 CA ***(refd)***

Humber & Co v. John Griffiths Cycle Co (1901) 85 LT 141 ***(refd)***

Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal [2014] 2 CLJ 401 FC ***(refd)***

Laponie (M) Sdn Bhd v. Ampledeal (M) Sdn Bhd & Ors [2015] MLRHU 1085 ***(refd)***

Lee Kuan Yew v. Tang Liang Hong [1972] 2 SLR 862 ***(refd)***

Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(refd)***

Rahmat Ali Fatehullah v. Calcutta National Bank Ltd AIR 1955 All 169 ***(refd)***

Saw Eng Guan & Ors v. Ng Sei Guan & Ors [2006] 1 LNS 196 HC ***(refd)***

Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals [2018] 9 CLJ 425 FC ***(refd)***

Tenaga Nasional Bhd v. Chew Tai Kay & Anor [2022] MLJU 50 ***(refd)***

Webb v. Stanfield & Anor [1990] 8 ACLC 715 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 181(1)(a), 223, 226(3)

Companies Act 2016, ss. 346(1)(a), (b), (2), 347, 348, 471(1), 472

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

Companies Act [Ind], s. 171

Companies (Queensland) Code 1982, s. 320(1)(a)(ii)

Other source(s) referred to:

The Corporate Powers – Accountability, 3rd edn, p 666

(Civil Appeal Nos: B-02(IM)(NCC)-715-06-2020 & B-02(IM)(NCC)-716-06-2020)

For the appellant - Ranjit Singh, Conrad Young & Simon Hong; M/s Simon Hong

(Civil Appeal No: B-02(IM)(NCC)-715-06-2020)

For the respondent - Wilson Lim Mao Shen & Huam Wan Ying; M/s Wilson Lim

(Civil Appeal No: B-02(IM)(NCC)-716-06-2020)

For the respondents - Wong Ren Yen, Emily Wong, Marcus Lee & Chiam Jia Ying; M/s Dennis Nik & Wong

[Editor's note: For the High Court judgment, please see Wong Kien Yip & Anor v. Ting Chew Thai & Ors [2020] 1 LNS 833 (overruled).]

Reported by Lina E

JUDGMENT

Darryl Goon Siew Chye JCA:

[1] These are two appeals before this court, lodged by the two appellants who were the plaintiffs in the originating summons filed.

[2] The originating summons dated 18 February 2019 was commenced by the appellants against three respondents as defendants, namely the first defendant, Ting Chew Thai ('first respondent'), the second defendant, Goh Sew Hua (f) ('second respondent') and the third defendant, Byard Spiral Mill Sdn Bhd ('company').

[3] By way of a notice of application dated 30 December 2019 (encl. 8), the first and second respondents applied to strike out the originating summons pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012 and/or the inherent jurisdiction of the court.

[4] By way of a notice of application dated 6 January 2020 (encl. 11) a similar application was made by the company to strike out the originating summons pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court and/or the inherent jurisdiction of the court.

[5] Both these applications were heard at the same time and on 4 June 2020, both the applications were allowed by the High Court. The originating summons was struck out. Hence the two appeals by the appellants against the decisions of the High Court in respect of the two separate applications made by the respondents.

[6] On 22 January 2021, both appeals were ordered to be heard together at the same time. This is the judgment of the court.

Background Facts

[7] The originating summons was filed by the appellants invoking, primarily, s. 346 of the Companies Act 2016 ('CA 2016'). The reliefs sought by the appellants set out in the originating summons were as follows:

1. a declaration that:

   1.1 the affairs of the 3rd Defendant are being conducted or the powers of the directors are being exercised in a manner oppressive and/or in disregard of the Plaintiffs' interests as members and/or shareholders of the 3rd Defendant;

   1.2 the various acts of the 1st and 2nd Defendants have been done or are threatened to be done which have and/or will unfairly discriminate against and/or which are and/or will be otherwise prejudicial to the Plaintiffs;

2. a declaration that the 1st and/or 2nd Plaintiffs are legal and/or beneficial owners of 50% (175,500 shares) of the paid-up share capital of the 3rd Defendant;

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3. an order that the 1st and/or 2nd Defendants, whether jointly or severally, purchase the Plaintiffs' 175,500 shares or 135,500 shares in the 3rd Defendant at a price to be determined by this Honourable Court;

4. an order that the 1st and 2nd Defendants do cause the discharge and release of all the personal guarantees given by the Plaintiffs for any facilities or transactions whatsoever of the 3rd Defendant;

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5. further or alternatively, an order for damages to be assessed and paid by the 1st and/or 2nd Defendants, whether jointly or severally, to the Plaintiffs or the 3rd Defendant;

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6. such directions or other orders be given as deemed fit and proper by this Honourable Court;

7. further or alternatively, such directions or orders as are required under Section 346 of the Companies Act 2016 for the regulation of the affairs of the 3rd Defendant;

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8. the costs of this application be paid by the 1st and/or 2nd Defendants, whether jointly or severally, to the Plaintiffs; and

9. such further or other relief be given as deemed fit and proper by this Honourable Court.

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[8] In the originating summons, the grounds for the appellants' application were stated to be as set out in their affidavits filed in support of their application and they were also briefly set out in the originating summons to be as follows:

(i) the plaintiffs did not take any active role in managing the third defendant and left it to the first defendant who is the Managing Director and has full control of the third defendant;

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(ii) sometime in December 2017, the plaintiffs discovered that the first defendant had been misusing funds of the third defendant for his own personal interest, thereby dissipating the assets of the third defendant;

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(iii) all efforts and attempts to resolve the matter failed;

(iv) the affairs of the third defendant are being conducted or the powers of the directors are being exercised by the first and second defendants in a manner oppressive and/or in disregard of the plaintiffs' interests as members and/or shareholders; and

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(v) the various acts of the first and second defendants have been done or are threatened to be done which have and/or will unfairly discriminate against and/or which are and/or will be otherwise prejudicial to the plaintiffs.

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[9] Both the first and second respondents were directors and shareholders of the company.

[10] The first appellant is a shareholder and, at one time, a director of the company and the son of the second appellant. The second appellant claims to have beneficial interests in the first appellant's shares in the company and was himself involved in the setting up of the company with the first and second respondent. Although never in active management of the company, the second appellant claims to have been one of the authorised signatories to the company's bank account.

[11] As indicated, the originating summons was filed on 18 February 2019. Two days later, on 20 February 2019, the company was ordered to be wound up by the High Court holden at Penang pursuant to Companies (Winding-Up) Petition No: PA-28NCC-156-11-2018 which was presented by a company, Boardroom Advisory Sdn Bhd, as the petitioner. It was also ordered that one Chong Chuan Long be appointed as the liquidator of the company.

[12] On 23 April 2019, the appellants sought leave of the winding up court pursuant to s. 471(1) of CA 2016 to proceed with the originating summons as against the company. This application was opposed by the liquidator who was appointed and the application was dismissed on 6 September 2019. The court held that no leave was required 'since no liability is intended to be fastened on the company or its assets, as the company is sued merely as a nominal defendant.' No appeal against this decision was filed by either the appellants or the respondents.

[13] Following this decision, both the applications to strike out the originating summons were made by the first and second respondent and by the company, respectively.

[14] The applications to strike out the originating summons were predicated upon the fact that the company had been wound up and no leave to proceed against the company was granted.

Striking Out Of The Originating Summons

[15] Central to the respondents' applications to strike out the originating summons was the decision of this court in *Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors* [2003] 2 CLJ 445; [2003] 3 MLJ 742, which case shall hereinafter be referred to simply as *Henrick*.

[16] In *Henrick*, a petition based on allegations of oppression carried out in a company was filed by the petitioner on 16 January 1996 pursuant to s. 181 of the Companies Act 1965 ('CA 1965'), which was then in force (the 'oppression petition'). The petitioner in the oppression petition sought *inter alia* an order for the petitioner's shares in the company to be bought by the

respondent. However, prior to the filing of the petition, on 18 October 1995, a winding up petition was filed by the respondent to wind up the said company and on 19 January 1996, the said company was ordered to be wound up. Thus, the said company was wound up three days after the presentation of the oppression petition. In light of the fact that the said company had been wound up, the respondent sought to strike out the oppression petition. The respondent's application was allowed by the High Court and, by a majority, the decision of the High Court was upheld by this court.

[17] In the majority decision of this court in *Henrick*, the decision of Abdul Hamid Mohamad JCA and Richard Malanjum JCA, as their Lordships then were, it was stated as follows:

> Now having considered the contentions of learned counsel for the parties and the authorities cited, by majority, we were inclined to accept the proposition of law as expounded in *Webb v. Stanfield. In other words, since a winding up order has already been granted to wind up the said company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s. 181 of the Act and as contained in the said petition could no longer be sustained.* In *Webb v. Stanfield* this is what the appellate court said at p. 719:
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> > But to admit that the proceedings by the applicant under s. 320 may continue unabated is to ignore the fact that the company is presently in the process of being wound up under an order of this court that remains unchallenged. (emphasis added)

[18] Thus, much reliance was placed on the decision in *Webb v. Stanfield & Anor* [1990] 8 ACLC 715 by the majority in *Henrick*. In *Webb v. Stanfield*, there was an application brought upon allegations of oppression pursuant to s. 320 of the Companies (Queensland) Code 1982. At a procedural stage where directions were to be given, the application was dismissed. Subsequently, the company in which the alleged oppression occurred was compulsorily wound up by an order made. The applicant appealed. Although the court was of the view that the proceedings at first instance was miscarried as a matter of procedure, the decision to dismiss the application was held to be the right result. This was due to the fact that the company in question had been ordered to be wound up. What was significant in that case may be found in the passage below which was set out in the judgment of McPherson J, with Demack and Williams JJ concurring, at p. 719:

> The applicant's complaint is of Stanfield's action in allegedly appropriating to himself or his new company the advantages of the company's agency agreement or its business with Capita. *The very basis of that assertion is that Stanfield did so on his own behalf and not on behalf of the company Stanfield Webb & Associates Pty Ltd. The applicant's claim for relief under sec. 320 by way of order for purchase of his shares is therefore not within the literal terms of sec 320(1).*

> *If it is objected that this represents too narrow a reading of the provision, the fact remains that the relief sought has, with the intervention of the winding up, ceased to be such as may in this, and perhaps in any other case, be appropriately awarded.* The company is insolvent and its affairs are under the control of an officer of the Court, who is engaged in a form of administration prescribed with some particularity by statute, in which the interests of the creditors are entitled to consideration in priority to those of any member or contributory. *If it be the case that Stanfield's conduct has caused loss to the company, then it is open to the liquidator by proceedings under sec. 542 of the Code or by action in the name of the company in the ordinary way to recover the loss from Stanfield.* If such proceedings are taken and succeed, any judgment that follows or its proceeds will enure for the benefit of the company and so form part of the assets from which the claims of creditors and the costs and expenses of winding up will be met. *If the liquidator declines to institute such proceedings, the applicant may apply to the Commission under sec. 542(1) for authority to make the application himself; or, upon tendering an appropriate indemnity for costs, apply to the Court for leave to use the name of the company in an action against Stanfield.* (emphasis added)

[19] It therefore can be seen that in *Webb v. Stanfield*, the remedy sought was understood as being one in respect of wrongs committed against the company by Stanfield. Thus, the view held that the remedy of an order that the applicant's shares be purchased by Stanfield was, '… not within the literal terms of s. 320(1)'. In addition, the court was of opinion that it was a claim that the liquidator may pursue on behalf of the company and if the liquidator failed to do so, leave to pursue the claim against Stanfield, in the name of and for the benefit of the company, may be sought by the applicant.

[20] In line with the reasoning in *Webb v. Stanfield*, the majority in *Henrick*, in the closing passages of their judgment, observed, at p. 753, that:

> We are therefore substantially in agreement with the view of the learned judge in the court below that it cannot be said that the effect or effects of an oppressive act or acts complained of would continue to subsist upon the granting of a winding up order of a company and followed by an appointment of a liquidator. *From that point in time it is the liquidator who is running the affairs of the company. It should therefore be open to the aggrieved party to bring this complaint to the liquidator without having to resort to s. 181 of the Act.* (emphasis added)

[21] In *Henrick*, an additional point was made by the majority in this court. It was as follows:

> Another compelling reason in our view why the said petition could no longer be maintained after the granting of the winding up order of the said company and the appointment of a liquidator is the provision of s. 223 of the Act. The section reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alternation in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.
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> Thus, in view of this prohibition, prayers (a) and (b) of the said petition cannot be entertained unless sanctioned by the court.

Prayers (a) and (b) in *Henrick* were orders sought by the petitioner for the purchase of the petitioner's shares.

[22] The learned judge in the High Court accepted the applicability of the decision in *Henrick* and concluded that the attempts to distinguish *Henrick* from the case at hand was without any valid basis and must be rejected. The learned judge concluded that the reliefs sought in the originating summons for a 'buy out' of shares, '… cannot be granted as it is contrary to the statutory prohibition in s. 346 of CA 2016 against share transfers after the winding up of the company'. Reliance was placed by the learned judge on the decisions in *Saw Eng Guan & Ors v. Ng Sei Guan & Ors* [2006] 1 LNS 196; [2006] 5 MLRH 505 and *Laponie (M) Sdn Bhd v. Ampledeal (M) Sdn Bhd & Ors* [2015] MLRHU 1085.

[23] Lastly, the learned judge, having concluded that the originating summons was no longer maintainable by reason of the company being wound up, held the view that it was no longer necessary to deal with the issue of whether leave was required to proceed with the originating summons. However, the learned judge did observe that the appellants' contention that the first and second respondents and the company were precluded from raising the issue of leave by reason of *res judicata* was uncompelling, referring to the decisions in *Lee Kuan Yew v. Tang Liang Hong* [1972] 2 SLR 862 and *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2011] 1 CLJ 1; [2011] 1 MLJ 145.

[24] Thus, the striking out of the originating summons rested primarily on the decision in *Henrick*.

Ought The Originating Summons Be Struck Out?

[25] Several points may be made of the decisions in *Webb v. Stanfield* and *Henrick vis-a-vis* the originating summons filed, as pointed out by learned counsel for the appellants.

[26] The ambit of s. 320 of the Companies (Queensland) Code 1982, which was in issue in *Webb v. Stanfield*, was somewhat different from that provided in s. 181 of CA 1965.

[27] Section 320 of the Companies (Queensland) Code 1982 provided as follows:

Remedy in cases of oppression or injustice

320(1) An application to the Court for an order under this section may be made by

(a) a member of a company who believes

(i) that affairs of the company are being conducted in a manner oppressive to one or more of the members (including that member); or

(ii) that directors of the company have acted in affairs of the company in their own interests and not in the interests of the members as a whole or in any other manner whatsoever that is unfair or unjust to one or more of the members (including that member) other than the directors; or

(b) in a case where the Commission has received a report by an inspector under this Code or where the Commission has made a report under Part VII to the relevant authority within the meaning of that Part of the Commission.

[28] Section 181 of CA 1965, on the other hand, stated as follows:

Remedy in cases of an oppression

181(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

[29] Save for very minor differences, for example 'holders of debentures' now referred to as 'debenture holders', s. 346(1) of CA 2016 is materially the same as s. 181(1) of CA 1965. Section 346(1) states as follows:

Remedy in cases of an oppression

346(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or

A (b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

B **[30]** As can be seen s. 181 of CA 1965, particularly sub-s. (1)(b), is wider than s. 320(1)(a)(ii) of the Companies (Queensland) Code 1982. It also follows that s. 346 of CA 2016, the current iteration of s. 181, is equally wider than the Australian provision.

[31] Secondly, *Webb v. Stanfield* turned on the finding that the application C did not fall within s. 320 of the Companies (Queensland) Code 1982 or if it did, the claims were actually those of the company and the liquidator was in the position to make those claims on behalf of the company. The court also observed that should the liquidator fail to do so, leave for what is essentially a derivative action to be brought by the applicant in the name of D the company may be obtained.

[32] On this issue, the decision in *Henrick* echoed the reasoning applied in *Webb v. Stanfield.* This can be seen by the statement made by the majority in *Henrick* that, 'It should therefore be opened to the aggrieved party to bring his complaint to the liquidator without having to resort to s. 181 of the Act.'

E **[33]** Learned counsel for the appellants, however, pointed out that the claims by the appellants in the originating summons were not claims against the company. The claims were against the first and second respondents, with the company being a nominal party. This can also be seen in the declarations sought and the claim for damages allegedly suffered by the appellants to be F assessed and paid by the first and/or second respondents.

[34] As the appellants' claims were not against, or made on behalf of, the company it is important to bear in mind the fact that there is a difference between claims that a company may have that belongs to the company and claims that a member has a right to make, as a member, conferred under G s. 346.

[35] Where it is a claim that a company has the right to make, the liquidator appointed may pursue it on behalf of the company. In such a case, should the liquidator fail to do so, there may be a case for a member, as a H 'complainant', to seek leave to pursue a derivative action for and on behalf of the company, pursuant to ss. 347 and 348 of CA 2016.

[36] The originating summons is, however, brought pursuant to s. 346 of CA 2016. This section embodies a statutory right conferred by the Legislature upon 'any member or debenture holder of a company', not the I company. As such, it is not within the remit or power of a liquidator appointed, to bring or make such personal claims on behalf of members of

a company. In this sense, it would be futile for the appellants to bring their complaints or claims against the first and second respondents, to the liquidator.

[37] In addition, that damages may be granted as a form of relief in a petition brought under s. 181 of CA 1965 was a question of law settled by the Federal Court in *Koh Jui Hiong & Ors v. Ki Tak Sang & Another Appeal* [2014] 2 CLJ 401; [2014] 3 MLJ 10. It was held by the Federal Court in that case that:

> [26] Damages to members is not amongst the reliefs mentioned in s. 181(2) which provides that 'If on such application the court is of the opinion that either of those grounds is established the court may, with the view to bringing to an end or remedying the matters complained of make such order as it thinks fit and without prejudice to the generality of the foregoing the order may (a) direct or prohibit any act or cancel or vary any transaction or resolution; (b) regulate the conduct of the affairs of the company in future; (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself; (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or (e) provide that the company be wound up. *That is not however to say that the court could not award any other relief. Section 181(2) is a non-exhaustive list that does not limit other types of relief that the court could fashion, with the view to bringing to an end or remedying the matters complained of* (see *Company Law in Context, Text and Materials*, by David Kershaw at p 635).
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> …
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> [57] For the aforesaid reasons, *we answer the leave question in the affirmative and in the following terms. An order of a compensatory nature can be made in a petition under s. 181(1) of the Companies Act 1965, if the order is with the view to bring an end or to remedy the matters rightly complained of* under s. 181(1)(a) or (b). (emphasis added)

See also the decision of the Federal Court in *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors* [2021] 4 CLJ 721; [2021] 3 MLJ 549 and the case of *Drico Ltd v. Drico (Water-Specialist) Sdn Bhd & Ors* [2013] 1 LNS 1297 where damages were awarded by this court.

[38] It was also held by the Federal Court in *Auspicious Journey* as follows:

> [161] In summary, *on the primary legal issue before this court, namely whether liability can devolve upon directors and third parties in an oppression action under s. 181 of the CA 1965 (now s. 346 of the CA 2016) we concur with the appellant that such liability can, in an appropriate case, be imposed on directors and third parties.* However on the facts of the instant appeal, for the reasons we have stated, liability is not visited on the directors, the Kuah brothers. (emphasis added)

Thus, similarly, in respect of the instant case, liability may devolve upon the first and second respondents personally, as directors at the material time. The issue would be dependent on whether, upon the facts, the appellants are able to prove their case and can demonstrate that they have suffered any actual loss or damage that ought rightly be compensated by the first and second respondents.

[39] As the provisions in s. 181(1)(a) and (b) of CA 1965 are materially the same as those in the current s. 346(1)(a) and (b) of CA 2016, there is no reason why a claim for damages under the latter can be said to be obviously unsustainable.

[40] This issue also underscores the differences between the ambit of s. 320 of the Companies (Queensland) Code 1982 when compared, in particular, with s. 181(1)(b) of CA 1965 and now, s. 346(1)(b) of CA 2016.

[41] Section 346(1) of CA 2016, like s. 181(1) of CA 1965, is widely drafted when compared to the Australian provision. Section 346(1)(b) encompasses 'acts done' as well as 'threatened'.

[42] As for the relief, s. 346(2) of CA 2016 provides that, '… the court may make such order as the court thinks fit with the view to bringing to an end or remedying the matters complied of …'. As Nallini Pathmanathan FCJ stated in *Auspicious Journey*:

> [86] It is of equal importance to incorporate into this construction the purpose and intent of the legislature in enacting this statutory remedy. It is a remedial provision to arrest the mischief of the inadequacies of the common law in protecting the interests of the minority shareholders as examined earlier. *Bearing in mind that judicial pronouncements have pointed out that our s. 181 is wider in scope than the now repealed s. 219 of the English Act, our statutory provision therefore requires a liberal and broad interpretation, not a narrow or restrictive one* (see *Re Kong Thai Saw Mill (Miri) Sdn Bhd* [1978] 2 MLJ 227 (Privy Council) ('*Re Kong Thai*'); and *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 (FC)).
>
> [87] In any event, such an approach has been adopted in the construction of oppression provisions throughout the Commonwealth. This lends support to the liberal interpretation accorded to s. 181 above.
>
> (emphasis added)

[43] As regards the remedy sought of an order that the first and second respondents purchase the plaintiffs' shares in the company, it cannot be disputed, as pointed out in *Henrick*, that s. 223 of CA 1965 provides generally that any transfer of shares after the commencement of winding up is void. However, s. 223 also provides that it need not be so if a court were to order otherwise.

[44] Section 472 of CA 2016, which replaces s. 223, states as follows:

> 472. Avoidance of dispositions of property or certain attachments
>
> (1) Any disposition of the property of the company, other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, **unless the Court otherwise orders,** be void. (emphasis added)

[45] Therefore, clearly, the power of the court to authorise transfers of shares in circumstances contemplated under s. 472 of CA 2016 continues to exist. The prohibition is not absolute.

[46] There is then the issue of whether leave to proceed under s. 471 of CA 2016 is required. Section 471 states as follows:

> **Action or proceeding stayed after winding up order**
>
> 471(1) When a winding up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.
>
> (2) The application for leave under subsection (1) shall be made in the Court granting the winding up order and shall be served on the liquidator.
>
> (3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

[47] As mentioned, after the company was ordered to be wound up, the Appellants applied in the winding up court, seeking leave to proceed under s. 471 of CA 2016. That application was made on 23 April 2019 and it was heard on 21 August 2019. Decision on the application was reserved by the learned Judicial Commissioner and delivered on 6 September 2019. In the learned Judicial Commissioner's grounds of judgment, it was concluded that:

> [18] …, since no liability is intended to be fastened on the company or its assets, as the company is sued merely as a nominal defendant leave of the court is not required under subsection (1) of section 471 of the Companies Act 2016. The application for leave is therefore dismissed.

In coming to this conclusion, the learned Judicial Commissioner considered several authorities including the decision of the Federal Court in *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd & Other Appeals* [2002] 2 CLJ 1; [2002] 2 MLJ 1.

[48] In *CGU Insurance*, the Federal Court was concerned with s. 226(3) of CA 1965 *vis-a-vis* the dismissal of an application for security for costs made by a defendant against the plaintiff, which was a company that was wound up after the action was filed, and the subsequent appeal against the dismissal of that application. Section 226(3) provided as follows:

> 226. …
>
> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

[49] Steve Shim CJ (Sabah & Sarawak), in delivering the judgment of the Federal Court, stated as follows:

> The factual circumstances therefore came to play. In the Ipoh suit, the facts show that *the appeal lodged by the appellant is not a proceeding intended to fasten liability on the respondent (the company under liquidation) or its assets but is essentially a proceeding commenced or instituted by the appellant with the object of exculpating itself from liability arising out of an action commenced or initiated by the respondent.* The appellant is not a claimant as such nor is it a creditor of the respondent. *It is not seeking to make inroads into the assets of the respondent but merely to set aside a liability pinned on it by virtue of a successful action brought against it by the respondent.* Clearly, the appeal is in the nature of a defensive action. … *In the circumstances, we take the view that the appeal or the application for security of costs does not fall within the meaning of the phrase 'action or proceeding … proceeded with or commenced against the company' in s. 226(3) of the Act.* (emphasis added)

[50] In coming to its decision in *CGU Insurance*, the Federal Court expressly preferred the views expressed in the decision of the House of Lords in *Humber & Co v. John Griffiths Cycle Co* (1901) 85 LT 141 and the decision of the full bench of the Allahabad High Court in *Rahmat Ali Fatehullah v. Calcutta National Bank Ltd* AIR 1955 All 169.

[51] In *Rahmat Ali*, a decision which the Federal Court found the arguments proffered 'powerful and well-modulated', it was stated as follows:

> Whenever a matter comes up before a court and an objection is taken that leave under s. 171 Companies Act had not been obtained, the court has to decide whether it is a suit or other proceeding against the company. If the words 'against the company' merely mean that the company is arrayed as the opposite party, as was held by Braund J, permission of the company judge would be necessary whenever any legal proceeding has been instituted or continued against the company.
>
> …

> **The words 'against the company' must mean a proceeding where the liability is intended to be fastened on the company or its assets** and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself.
>
> (emphasis added)

The provision that was under consideration in *Rahmat Ali* was s. 171 of the Indian Companies Act, which was considered in *pari materia* with s. 226(3) of CA 1965 by the Federal Court in *CGU Insurance.*

[52] In our view, the rationale in CGU is that one must examine the intent of the proceeding brought. We do not think it was intended that the proceeding must necessarily be a proceeding literally in the nature of a defensive action. It is clear in the judgments in *CGU Insurance* and *Rahmat Ali* that the rationale why in a defensive action leave is not required was premised on the fact that no liability is 'intended to be fastened on the company or its assets'. Thus, in *CGU Insurance*, it was held that '… the appeal or the application for security of costs does not fall within the meaning of the phrase 'action or proceeding … proceeded with or commenced against the company' in s. 226(3) of the Act.'

[53] That the application made for security for costs, which cannot in itself be regarded literally as a defensive action, was held not to be an 'action or proceeding … proceeded with or commenced against the company' in s. 226(3) of the Act' reinforces the point that the underlying rationale is whether liability is intended or sought to be imposed on the company in liquidation or its assets. It is not the case of who commences the action but whether the company or its assets will be put at risk of liability. That rationale can therefore continue to apply in respect of proceedings where no liability is sought to be imposed on a company in liquidation or recourse sought against any of its assets.

[54] Thus, if in the originating summons liability was intended to be imposed on the company or any of its assets, leave under s. 471 of CA 2016 would be required. In the instant case however, the company is merely a nominal party as quite rightly pointed out by the learned Judicial Commissioner. Clearly in light of the reliefs sought, particularly the purchase of the shares registered in the name of the first appellant by the first and second respondents, the company was appropriately included as a party to the proceedings, *albeit* as a nominal party. As was observed by the learned author of *The Corporate Powers – Accountability* (3rd edn) at p. 666:

> **16.2 Company as respondent**
>
> 9-523 Disputes in a s. 346 action are essentially between the shareholders and the company is a necessary nominal respondent for two principal reasons. First, is for the discovery of documents. Second, is to bind the company to any orders that the Court may make.

A **16.2.1 General rule: no active participation by company**

9-524 The starting point, according to Lindsay J in *Re a Company (No 001126 of 1992)*, is that the Court has a 'rebuttable distaste for [a company's] participation and expenditure' in the proceedings. The reason is that as a nominal respondent, the company should stay neutral unless its interests is affected. Otherwise it would lend weight to allegations that the company is taking sides in disputes between shareholders, or the majority directors are acting in conflict of interests or breach of duties in employing the company's funds to defend the petition or to take sides. The point that the company is a nominal party and that it must stay neutral is well illustrated by case law applying the principle that the funds of the company should not be used in disputes between shareholders.

B

C

The learned Judicial Commissioner in his grounds of judgment did quote from the same text but from its second edition.

[55] Though it may often be the case that the company is a nominal defendant, it is not necessarily so in all cases. It is not inconceivable that an application by a member under s. 346 of CA 2016 may be such as to include a claim the remedy for which might lead, directly or indirectly, to the assets of the company. In those circumstances, the company would not be merely a nominal defendant. If disputed, such a claim would entitle the company to take a more active step in resisting the claim. Careful regard must therefore be had for the intent of an application brought under s. 346 of CA 2016 and the remedies sought.

D

E

[56] In so far as the originating summons is concerned, and from the relief sought, no liability was sought to be 'fastened against the company or its assets'. Should there be any sought in the course of the proceedings, issues relating to s. 471 of CA 2016 would then come into play.

F

Conclusion

[57] Based on the foregoing considerations, the appellants' originating summons ought not to have been struck out summarily on an application under O. 18 r. 19 of the Rules of Court 2012. In coming to this conclusion, we have not sought to analyse the strength of the appellants' case.

G

[58] Having regard to the summary procedure employed, we have neither considered, nor are we concerned with, the strength of the appellants' case. The concern is with its sustainability. It is only where it can be said that a claim is 'obviously unsustainable' that one may succeed in striking out an action summarily.

H

[59] The applicable test is trite and well settled. It is only in plain and obvious cases that actions may be struck out summarily or, to put it another way, where the claim is 'obviously unsustainable' (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993]

I

3 MLJ 36). In *Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520, Abdul Malik Ishak JCA delivering the judgment of this court stated:

> [77] No matter how weak the case is and that the appellant is not likely to succeed at the trial, it is not a good ground for the writ of summons and the statement of claim to be struck out. In the event, the appellant's civil suit is dismissed at the trial, the respondent will be compensated by costs.

See also the decision of this court in *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192.

[60] More recently in the decision of the Federal Court in *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425; [2019] 1 MLJ 59, Ramli Ali FCJ, delivering the judgment of the court, stated in clear terms the principles to be applied and which merits reiterating:

> [16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC); *Hubbuck & Sons, Limited v. Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86; *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).
>
> [17] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, *inter alia*, as follows:
>
> (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;
>
> (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;
>
> (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and
>
> (e) the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
>
> [18] The Court of Appeal, in *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75, had adopted the well-settled principle of striking out in the following passage:

A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking *viva voce* evidence during trial (see: *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC)).

[19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.

[61] It is to be emphasised that it is not the decision of this court, although asserted by learned counsel for the appellant, that the decision in *Henrick* is somehow wrongly decided, *per incuriam*, or somehow not binding. It is well settled that it is not open for the Court of Appeal to depart from its earlier decisions (See *Tenaga Nasional Bhd v. Chew Tai Kay & Anor* [2022] MLJU 50). Whether the decision in *Henrick* is applicable, ought properly be determined after a determination of the material facts and the originating summons heard. In addition, it may well be that this case may reach the Federal Court whereupon the principle or principles established in *Henrick* may be reconsidered.

[62] Ultimately, suffice to say that the originating summons cannot be said to be obviously unsustainable. Accordingly, the appeals were allowed. The decisions of the High Court of 4 June 2020 were set aside. The originating summons was remitted to the High Court to be heard. Having regard to the circumstances, no order as to costs was made.